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May 23, 1984

The Honorable Floyd E. Boline
United States Magistrate
U.S. District Court
110 S. Fourth Street
Minneapolis, MN 55401

Re: U.S. v. Reilly Tar & Chemical Corporation
File No. Civ. 4-80-469

Dear Magistrate Boline:

Enclosed please find the original and one copy of the State of Minnesota's May 23, 1984, Memorandum in Response to Reilly Tar & Chemical Corporation's Renewed Motions to Compel Discovery.

Very truly yours,

Stephen Shakman

STEPHEN SHAKMAN
Special Assistant
Attorney General

SS:mah

cc: All counsel of record

Enc.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

STATE OF MINNESOTA'S MAY 23, 1984, MEMORANDUM IN RESPONSE TO REILLY TAR & CHEMICAL CORPORATION'S MOTIONS TO COMPEL DISCOVERY

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INTRODUCTION

There are a series of discovery motions now before this Court and scheduled for oral argument on May 30, 1984, and there have been numerous submittals regarding these several motions. _1/ Among these motions are those of Reilly Tar & Chemical Corporation ("Reilly Tar") seeking to compel discovery against both the State of Minnesota ("State") and the City of St. Louis Park ("City"). As to the State _2/, Reilly Tar moves for a discovery order:

(1) compelling the response to several hundred questions Reilly Tar asked at the depositions of two former State attorneys, one current State employee, two retired State employees and three attorneys representing the City and

(2) compelling the production of several documents in the possession of the State.

Claiming attorney client and work product privileges, the State objected to the questions posed to the witnesses and directed the witnesses not to answer. The State similarly resisted Reilly Tar's efforts to obtain privileged documents.

In this memorandum, the State demonstrates the validity of its objections by demonstrating that there exists neither legal

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_1/ To assist the Court in reviewing the numerous motions and submittals now before it, the State has attached to this memorandum a list of all the submittals of the parties relevant to these discovery matters. See Appendix 1.

_2/ Given this Court's order dismissing Reilly Tar's "implied settlement defense" against the State, the discovery sought against the State comes before this Court in a different context than the discovery sought against the City. See arguments, infra, at 9. However, some claims of privilege remain common to the City and State because they relate to communications between them as parties with common interests in anticipated or pending litigation against Reilly Tar.

nor factual bases for compelling the discovery Reilly Tar seeks against it. 3/ First, Reilly Tar's discovery motions against the State must fail because they demand responses to inquiries which fall outside the scope of discovery allowed under the Federal Rules of Civil Procedure. Those rules explicitly limit discovery to information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). The majority of the inquiries Reilly Tar directs to the State are not likely to lead to admissible evidence and, therefore, fall entirely outside the scope of permitted discovery. Second, the requested disclosures are protected by privileges which federal and state courts have long considered completely inviolate or inviolate absent a showing of good cause. Reilly Tar has failed to make this showing. For these reasons, Reilly Tar's motions to compel discovery against the State must be denied.

PROCEDURAL BACKGROUND

A relevant, though somewhat extended, procedural history precedes the scheduling of the discovery motions now before this Court. Since that procedural history must be understood if these motions are to be viewed in their proper context, it is briefly set out below.

3/ Although it never identifies any of its previous submittals, Reilly Tar incorporates the seventy-nine pages of its prior arguments into the fifty-eight pages of one of its most recent submittals. "Revised Memorandum in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery," dated April 20, 1984, ("Revised Discovery Brief") at 1, n. 1. In this response memorandum, the State attempts to fully respond to all of Reilly Tar's prior arguments.

On August 20, 1982, Judge Paul A. Magnuson issued an order denying the outstanding motions of Reilly Tar to dismiss this litigation. Twenty-eight days later, on September 17, 1982, Reilly Tar served its answer to the amended complaint of the State. In the first affirmative defense set forth in that answer, Reilly Tar asserted that the State's claims against it had been impliedly settled "by virtue of an Agreement for Purchase of Real Estate" between Reilly Tar and the City.

On April 20, 1983, after receiving on April 8, 1983, Reilly Tar's response to certain relevant requests for admissions and interrogatories, the State filed its notice of motion and motion for summary judgment to strike the "implied settlement" defense. Oral arguments were originally scheduled to be heard on May 4, 1983, before Magistrate Floyd E. Boline, but were later rescheduled to be heard by Judge Magnuson on July 29, 1983.

On June 24, 1983, Reilly Tar filed its brief in response to the State's summary judgment motion. On that same day 4/, Reilly Tar filed a notice of motion and motion to compel responses

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4/ In its Revised Discovery Brief at 1-2, Reilly Tar admits that the State challenged its settlement defense far in advance of the date Reilly Tar filed its discovery motions and then asserts that the State moved for summary judgment "[i]n anticipation of" Reilly Tar's discovery motions and "with the objective of forestalling Reilly's motion to compel." Reilly Tar's Discovery Brief at 1-2.

While these charges are baseless and insulting to both the Court and counsel, they do confirm one fact: Reilly Tar continues to believe it can fully intuit the unexpressed intentions of the State. This claim to omniscience is no more sound in Reilly Tar's current mischaracterizations of the State's motivations than it was in the arguments underlying its "implied settlement defense," and should be ignored.

to the questions which two attorneys who represented the State and three attorneys who represented the City during 1970-1973 refused to answer on the grounds that their responses are protected by the attorney-client and work product privileges. See Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for An Order Compelling Discovery ("Reilly Tar's First Discovery Brief.") Three weeks later, on July 14, 1983, Reilly Tar filed another brief, this time seeking to compel the production of certain documents the disclosure of which is also protected by the attorney-client and work product privileges. See Memorandum in Support of Reilly Tar & Chemical Corporation's Second Motion for an Order Compelling Discovery ("Reilly Tar's Second Discovery Brief").

The State responded to Reilly Tar's first two discovery briefs in two separate memoranda. See State's Brief in Response to Reilly Tar's Motion for An Order Compelling Discovery, dated July 19, 1983 ("State's First Discovery Brief") and State's Brief in Response to Reilly Tar's Second Motion for An Order Compelling Discovery (Documents), dated July 21, 1983 ("State's Second Discovery Brief"). 5/ In both its First and Second Discovery Briefs, the State pointed out that the sole basis Reilly Tar

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5/ Since Reilly Tar's discovery motions were also directed against it, the City submitted a response to Reilly Tar's discovery briefs. See Memorandum of the City of St. Louis Park in Opposition to the Motion of Reilly Tar & Chemical Corporation for an Order to Compel Discovery, dated July 19, 1983 ("City's First Discovery Brief"). Reilly Tar answered the memoranda of the State and the City on July 27, 1983. See Reply Brief of Reilly Tar & Chemical Corporation in Support of Its Motion to Compel ("Reilly Tar's Third Discovery Brief").

had given for its discovery motions against the State was its allegation of an "implied settlement" with the State. State's First Discovery Brief at 3; State's Second Discovery Brief at 1-2. Further, the State observed, a ruling by Judge Magnuson granting the State's motion for summary judgment would eliminate not only Reilly Tar's implied settlement defense, but also any basis for Reilly Tar's discovery motions against the State. State's First Discovery Brief at 3-8; State's Second Discovery Brief at 1-3.

Initially, oral arguments on Reilly Tar's discovery motions were scheduled to be heard by Judge Magnuson on July 29, 1983, the same date of the hearing on the State's motion for summary judgment to strike Reilly Tar's implied settlement defense. At the July 29 hearing, however, Judge Magnuson heard the settlement defense arguments, but remanded Reilly Tar's discovery motions to Magistrate Boline. In light of the consensus among counsel that a favorable ruling in the State's favor on its summary judgment motion would affect Reilly Tar's discovery motions against it, counsel for Reilly Tar, the State and the City agreed not to reschedule the discovery motions before Magistrate Boline until after Judge Magnuson's summary judgment ruling.

On August 25, 1983, Judge Magnuson granted the State's motion for summary judgment, concluding:

> The Court finds the record void of facts from which it could be reasonably inferred that a definite offer and acceptance between Reilly and the State occurred which could constitute a meeting of minds on the essential terms of a settlement agreement. Ryan v. Ryan, supra.

> Although discovery is not complete, the total absence of proof by Reilly Tar at this juncture to support its own affirmative defense of settlement warrants granting summary judgment to the State on this defense.

Memorandum Order, slip op. at 16, August 25, 1983 (Magnuson, J.)

After twice seeking unsuccessfully to have Judge Magnuson's summary judgment ruling vacated 6/, Reilly Tar now renews its motions to compel discovery. For all the reasons set forth herein, the renewed motions against the State should be denied.

ARGUMENT

I. THERE IS NO RIGHT TO DISCOVERY OF MATTERS OTHER THAN THOSE REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE: IN LARGE PART, REILLY TAR'S DISCOVERY MOTIONS DEMAND RESPONSES TO INQUIRIES WHICH ARE NOT REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE AND THEREFORE MUST BE DENIED.

The majority of Reilly Tar's inquiries to the State relate to its implied settlement defense, although some inquiries arguably relate to information which may bear upon construction of the terms of the explicit settlement between the City of St. Louis Park and

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6/ First, Reilly Tar filed a motion for reconsideration or for certification of the court's order for interlocutory appeal under 28 U.S.C. § 1292(b). When this motion was denied, Reilly Tar filed a petition for a writ of mandamus with the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit summarily denied this petition on January 24, 1984. In many of its more recent submittals, including those relevant to the discovery motions before this Court, Reilly Tar states it will move again for reconsideration of the order dismissing its settlement defense. If Reilly Tar so moves, the State will demonstrate again that the defense is legally and factually unsound. At present, the Order of August 25, 1983, governs as the law of the case.

Reilly Tar. 7/ In its latest memorandum, Reilly Tar argues (a) that those inquiries relating only to its implied settlement defense should be permitted because Reilly Tar intends to seek yet a third reconsideration of the order dismissing that defense and (b) that those inquiries relating to the explicit agreements between the City and Reilly Tar are not barred by the August 25, 1983, order striking Reilly Tar's implied settlement defense. Thus, Reilly Tar contends that the order striking the settlement defense should not be construed to bar any of the inquiries to the State. See Revised Memorandum in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery ("Revised Discovery Brief") at 29-32.

As demonstrated below, Reilly Tar's mere intention to seek reinstatement of the implied settlement defense provides no basis for this Court to compel discovery against the State on that subject. Moreover, Reilly Tar's inquiries to the State regarding the explicit agreements between Reilly Tar and the City largely seek legal interpretation by State attorneys and lay witnesses. Even if arguendo such interpretations are deemed relevant, they are properly made only by the Court. Reilly Tar's insistence

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7/ In its First Discovery Brief, the State analyzes Reilly Tar's own categorization of the questions it asked and, on the basis of that categorization, demonstrates that Reilly Tar's questions to the State relate to the implied settlement defense. State's First Discovery Brief at 4-8, especially at 6, fn. 6. See also State's Second Discovery Brief at 1-3. In Attachment 2 to this memorandum, the State does not repeat the arguments in its earlier submittals, but instead provides a question-by-question summary of Reilly Tar's inquiries involving the State and the grounds for objecting to those inquiries.

upon legal interpretations by others improperly invades the province of the Court and its other inquiries regarding the State generally fall outside the scope of discovery provided by the Federal Rules of Civil Procedure.

A. The Scope of Discovery is Limited to Inquiries Which Are Relevant to the Subject Matter of the Pending Action, Including Inquiries Inadmissible at Trial But Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Rule 26 of the Federal Rules of Civil Procedure plainly and unequivocally establishes the scope and limits of discovery in a civil action. In relevant part, Fed. R. Civ. P. 26(b) provides:

> (b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, the federal rules of civil procedure limit the scope of permitted discovery to inquiries "relevant to the subject matter involved in the pending action," including those inadmissible at trial but "reasonably calculated to lead to the discovery of admissible evidence."

B. Reilly Tar's Inquiries Related to Its Implied Settlement Defense Fall Squarely Outside the Scope of Discovery Provided By the Federal Rules of Civil Procedure.

In its Revised Discovery Brief, Reilly Tar makes absolutely no effort to show that its discovery request falls within the limits of Fed. R. Civ. P. 26(b). 8/ Instead, it reiterates its displeasure with Judge Magnuson's order striking the implied settlement defense and complains that "if discovery is not presently allowed on the issue of the implied settlement of the lawsuit, [Reilly Tar] will be unable to avoid the law of the case on this issue." Reilly Tar's Revised Discovery Brief at 30. This statement both misunderstands the doctrine of "law of the case" and ignores the substance of this Court's earlier ruling. It also stands as a complete reversal of the position acknowledged by Reilly Tar's counsel in an affidavit it submitted to this Court last summer. In his affidavit of September 2, 1983, Reilly Tar counsel Edward J. Schwartzbauer stated that "the practical effect of the Order of August 25, 1983 is that the Court has in fact compelled the Magistrate to sustain the State's position on the motion to compel because the settlement appears no longer to be an issue. . . ." 9/

8/ Reilly Tar does not even refer to Fed. R. Civ. P. 26(b) or any other discovery rule in its lengthy Revised Discovery Brief. See, e.g., Reilly Tar's Revised Discovery Brief at 29-32.

9/ This affidavit was submitted to the Court by Reilly Tar in its effort to persuade the Court to reconsider its August 25, 1983, Order.

The doctrine of the "law of the case" is not "an amorphous concept" as Reilly Tar claims in its Revised Discovery Brief at 30; it is a simple and well-settled doctrine referring to the practice of courts to give continuing effect to a ruling made earlier in the same litigation. Messenger v. Anderson, 225 U.S 436, 444 (1912); In Re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981). Professor Moore explains the doctrine as follows:

> Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in successive stages of the same litigation. This principle has sometimes been thought of as a variety of the res judicata principle, and in the context of successive appeals thought to rest on jurisdictional principles [footnote omitted]. As applied in the federal courts today, it bears a closer resemblance to the doctrine of stare decisis [footnote omitted]. Like stare decisis, it serves the dual purpose of: (1) protecting against the agitation of settled issues; and (2) assuring the obedience of inferior courts to the decisions of superior courts [footnote omitted]. . . .
>
> At the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time [footnote omitted], but efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling. . . .

1B Moore's Federal Practice (2d ed.) ¶ 0.404[1], pp. 117-118. Thus, under the doctrine of "law of the case" inferior courts are bound to and must act consistently with the decisions of superior courts and cases are managed in an efficient and logical manner.

Referring to the fact that the doctrine does not preclude courts from reexamining earlier rulings "in the light of changes

in governing law, newly discovered evidence, or the manifest erroneousness of a prior ruling" (In Re Multi-piece Rim, supra at 678), Reilly Tar seeks to persuade the Magistrate that he should ignore the Court's dismissal of Reilly Tar's implied settlement defense and order discovery on that no longer pending issue. Reilly Tar's Revised Discovery at 30-32. The State respectfully submits that Reilly Tar's argument is based on a complete misunderstanding of the Magistrate's responsibility for carrying out the orders of the Court, including application of the doctrine of "law of the case."

The doctrine of "law of the case" allows Judge Magnuson to reverse his earlier order dismissing the settlement defense if he could be persuaded that the order was erroneous. 10/ However, unless and until Judge Magnuson or some higher court reinstates the settlement defense, that defense no longer exists and, under Fed. R. Civ. P. 26(b), discovery is not permitted

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10/ Reilly Tar implies that it will be successful in having the settlement defense reinstated because it has now discovered documents and tapes of Minnesota Pollution Control Agency meetings which the Court did not have when it dismissed the settlement defense. Reilly Tar's Revised Discovery Brief at 31-32. These documents and tapes, which relate only to State activities, cannot alter Judge Magnuson's finding, twice stated, that: "No one acting on behalf of Reilly Tar has stated that he or she negotiated a settlement with the State." Memorandum Order, slip op. at 9, 13 (August 25, 1983). They cannot supply the "mutual manifestation of intent" required to support the existence of a contract. Reilly Tar's continuing inability to make the required proof -- a showing the Court held it had to have been able to make to survive summary judgment -- is fatal to its case. See also discussion in text, infra, at 13.

thereon. In short, until there is a reversal of the order dismissing Reilly Tar's implied settlement defense, Reilly Tar's inquiries related to that defense fall squarely outside the scope of permitted discovery. 11/

11/ The summary in Appendix 2 to this memorandum indicates that many of Reilly Tar's inquiries are objectionable because they relate only to a matter no longer at issue in this litigation. Examples of these objectionable inquiries are the following:

> BY MR. SCHWARTZBAUER:
>
> Q Did you, Bob [Lindall], discuss with Mr. Koonce [an employee of the Minnesota Pollution Control Agency] the fact that if the City acquires the property the PCA should close the matter --
>
> MR. COYNE: I will object.
>
> Q -- and leave it up to the City to solve its own problems.
>
> MR. COYNE: I object for the reasons previously stated and direct the witness not to answer.
>
> BY MR. SCHWARTZBAUER:
>
> Q Was that in fact a discussion you had with Mr. Koonce arising out of the correspondence you had with Gary Macomber and Tom Reiersgord relative to dismissing -- striking the case from the calendar?
>
> MR. COYNE: I would object to the question for the reasons previously stated and direct the witness not to answer.

Dep. of Lindall at 139:14-140:4. These questions relate only to Reilly Tar's claim that the State had impliedly settled its 1970 litigation with it. In addition to being objectionable on privilege grounds, these questions are improper because they are not reasonably calculated to lead to admissible evidence regarding any existing claim in the litigation and, therefore, fall outside the scope of permitted discovery.

Moreover, even if discovery were not so barred, Reilly Tar's argument that it needs to conduct further discovery on its implied settlement defense "to avoid the law of the case on this issue," ignores completely the fact that this Court already has considered and rejected Reilly Tar's argument that further discovery on the defense should be permitted before dismissing the defense. Memorandum Order, slip op. at 16, August 25, 1983, (Magnuson, J.) The Court of Appeals for the Eighth Circuit found no clearly erroneous conclusion in the District Court's ruling that dismissal was appropriate even though Reilly Tar argued strenuously that discovery had not been completed. Memorandum Order, Civ. No. 83-2627, slip op. at 2, January 24, 1984 (per curiam). In addition, case law unequivocally confirms that where no material issue of fact is in dispute, summary judgment is appropriate even if discovery is incomplete. Wallace v. Brownell Pontiac-GMC Company, Inc., 703 F.2d 525 (11th Cir. 1983).

C. The Opinions of the State's Counsel on Statutes and Regulations Pled in the 1970 Lawsuit Are Not an Appropriate Line of Inquiry for Reilly Tar Because (1) Interpretation of Law is an Essential Judicial Function and Not a Matter for Testimonial Evidence and (2) Even If Testimony Were Allowed, It Would Be Testimony of an Outsider to the Settlement Agreement and Therefore Irrelevant under Minnesota Standards for Contract Interpretation.

In its First Discovery Brief, Reilly Tar states that "it is of critical importance that Reilly be allowed to inquire of the draftsmen of the suit concerning its actual, legal scope." First

Discovery Brief at 8. 12/ The State objected to these inquiries initially on the ground of privilege 13/; the inquiries also are objectionable in that they seek testimony regarding subjects which are purely matters of legal interpretation and argument.

Interpretation of the scope and meaning of laws (including both statutes and regulations) is a matter for judicial analysis, not for testimonial evidence. Cf. In re Prudence-Bonds Corporation, 76 F.Supp. 643, 646, (E.D.N.Y. 1948) (holding that the objectors to an account for judicial settlement filed by a trustee have no right to obtain the opinions of counsel received by the trustee in the course of his duties since "the opinion or advice by counsel is not evidence of facts" and "is irrelevant unless the client voluntarily seeks exculpation because of it.") Despite this principle, Reilly Tar sought to inquire into areas of legal opinion through questions asked to attorneys and lay witnesses during their depositions. For example, Reilly Tar asked Robert Lindall, former Special Assistant Attorney General

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12/ It should be noted that while State attorneys were involved in drafting the 1970 Complaint against Reilly Tar, they played no role in drafting or reviewing the documents which constitute the settlement entered into by Reilly Tar and the City. While inquiries as to the intentions of the parties to that settlement (i.e., the City and Reilly Tar) are arguably relevant in determining the scope of the settlement, inquiries as to State employees' interpretation of that settlement have absolutely no bearing on the actual terms of that settlement. See discussion of contract interpretation infra at 16-17.

13/ See arguments, infra, at 19-40.

to the Minnesota Pollution Control Agency, the following series of questions:

Q: I am going to direct your attention to Roman Numeral VII [of the State's Complaint], Bob. It reads 'Defendant, through the conduct of the aforesaid business activities, is presently, and has been in the past, polluting the waters of the State of Minnesota in violation of law and administrative regulations, including, but not limited to Water Pollution Control Regulation 4 . . .' etcetera.

Now, at the time you drafted the Complaint did you have an understanding of the statutory definition of the waters of the State?

MR. COYNE: I object on the basis that it elicits from the witness attorney work product and his impressions and understanding at the time the lawsuit was filed.

MR. SCHWARTZBAUER: Is that an instruction?

MR. COYNE: Yes.

BY MR. SCHWARZBAUER:

Q: I am going to read to you Bob, from Minnesota Statute 105.37, Subdivision 7, which defines the words "waters of the State."

* * * *

. . . "Waters of the State means any waters, surface or underground, except those surface waters which are not confined, but are spread and diffused over the land. Waters of the State including all boundaries and inland waters."

Were you aware of that statutory definition at the time you drafted that Complaint?

MR. COYNE: I object and instruct the witness not to answer.

BY MR. SCHWARTZBAUER:

Q: At the time you drafted this paragraph of the Complaint, Bob, were you aware that the statutory definition of the

words "waters of the State" included ground waters and -- as well as surface waters?

MR. COYNE: I object and instruct him not to answer.

Deposition of Lindall at 42:25-44:15.

These questions to Mr. Lindall seek to determine his interpretation of certain laws at the time the 1970 complaint against Reilly Tar was drafted. Reilly Tar argues that its inquiries regarding Mr. Lindall's knowledge of these laws in 1970 are relevant to the interpretation of the scope of the subsequent settlement of that litigation and other agreements between Reilly Tar and the City. 14/ Revised Discovery Brief at 15, 32. Not only is Reilly Tar seeking to invade the judicial function of construing the law, it is also ignoring the standards for interpretation of Minnesota contracts which require that the operative meaning of a settlement contract be found in the transaction and course of dealings among the parties to the contract.

14/ As explained in the text, supra, at 3-6, there is no settlement between Reilly Tar and the State. The dispute as to the scope of the settlement of the 1970 lawsuit is an issue only between the parties to that settlement, Reilly Tar and the City. It should be noted that the only claims in the 1970 joint complaint which could have been brought by the City were related to air emissions (i.e., the City Ordinance and public nuisance violations in paragraphs V and VI of the complaint). All water violations were brought under the authority of the provisions of the Minnesota Water Pollution Control Act [i.e., Minn. Stat. §§ 115.01-.09 (1969)] and were enforced exclusively by the Attorney General in the name of the State. Minn. Stat. § 115.47, subd. 1 (1969). Since the City had no authority to settle claims brought exclusively by the MPCA, the City's dismissal of its 1970 lawsuit related only to air pollution claims and has no bearing on Reilly Tar's present claims or defenses against the City.

A settlement to litigation is a contract between the settling parties. Federal courts resolve disputes governing the meaning of contracts by reference to state law. Memorandum Order, slip op. at 13, August 25, 1983 (Magnuson, J.) In Minnesota, the interpretation of contracts largely follows the analysis set forth in the Restatement (Second) of Contracts § 212 (1981); Anderson v. Kammeier, 262 N.W.2d 366, 370 n.2; citing Restatement, Contracts 2d Tent. Draft No. 5, §§ 238 which was adopted in final version as § 212.

As to interpretation of the meaning of the terms of contract, the Restatement provides:

> (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

Restatement (Second) of Contracts, § 212.

The comments on the Restatement explain as follows:

> (a) **"Objective" and "subjective" meaning.** Interpretation of contracts deals with the meaning given to language and other conduct by the parties rather than with the meanings established by law. But the relevant intention of a party is that manifested by him rather than any different undisclosed intention. In cases of misunderstanding, there may be a contract in accordance with the meaning of one party if the other knows or has reason to know of the misunderstanding and the first party does not. [Citations omitted.] The meaning of one party may prevail as to one term and the meaning of the other as to another term; thus the contract as a whole may not be entirely in accordance with the understanding of either. When a party is thus held to a meaning of which he had reason to know, it is sometimes said that the "objective" meaning of his language or other conduct prevails over his "subjective" meaning. Even so, the operative meaning is found in the transaction and its context rather than in the law or in the usages of people other than the parties [to the contract.]

> (b) **Plain meaning and extrinsic evidence.** It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties [citations omitted]. . . .

[Emphasis added.]

Thus, under either path of analysis the Court might take in reviewing the scope of settlement between the City and Reilly Tar, Mr. Lindall's interpretation of the laws in 1970 is immaterial. First, the Court might wish to limit its analysis of the City-Reilly Tar settlement to the language on the face of the documents (e.g., the Purchase Agreement, the Hold Harmless Agreement, the St. Louis Park dismissal of its 1970 lawsuit, and the counts of the 1970 lawsuit subject to that dismissal). 15/ If so, the Court can determine from the counts of the 1970 complaint and its judicial interpretation of the laws and regulations pled, the meaning of the elements of that lawsuit. Second, if the Court were to permit extrinsic or parol evidence on the City-Reilly Tar agreements (as is favored by Minnesota law), it may wish to inquire into the factual background of the agreements so that it may determine the manifest intentions of

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15/ See note 14, supra.

the parties. 16/ Under this analysis, too, the inquiries to Mr. Lindall are not material because they do not seek to elicit evidence of the facts known to the parties making those agreements (i.e., the City and Reilly Tar) but merely inquire as to the subjective legal interpretations of one lawyer who worked on the case. Such interpretation by outsiders to a contract, be they attorneys or lay persons, will be of no assistance in construing the meaning of that contract. Reilly Tar's inquiries to the State's counsel seek only to reach an outsider's subjective interpretation of the agreements between Reilly Tar and the City. Since they are not the the intentions of any party to that settlement, they are not relevant to this litigation. Thus, Reilly Tar cannot make the showing necessary to justify an order compelling responses to these inquiries by State counsel.

16/ Questions as to facts showing ground water conditions at the Reilly Tar site around 1972-1973 as known by City, State and Reilly Tar officials would be proper areas of inquiry because they would provide testimony tending to prove the likely intentions of the City and Reilly Tar in their agreements. These fact questions are more properly directed to lay witnesses. Winter v. Koratron Company, 50 F.R.D. 225, 227 (N.D. Cal. 1970). Subsequent to the depositions of the State's attorneys Lindall and Van de North, Reilly Tar deposed at least four lay witnesses with knowledge of ground water conditions. See, e.g., Wikre Deposition, 55:4-56:15 and 115:17-116:20; Cherches Deposition, 124:11-125:16; McPhee Deposition, 185:4-185:13. Moreover, Reilly Tar's own plant manager, chief engineer and vice-president, also testified to their knowledge of such conditions. See, e.g., Finch Deposition, 589:16-589:24. The availability of these witnesses to testify as to facts further undercuts Reilly Tar's arguments that examination of counsel on these matters is necessary. See arguments, infra, at 40, n. 29.

II. THE INQUIRIES WHICH REILLY TAR DIRECTS TO THE STATE SEEKS DISCLOSURE OF INFORMATION, COMMUNICATIONS AND DOCUMENTS WHICH ARE PROTECTED BY PRIVILEGES: REILLY TAR HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING GOOD CAUSE TO SACRIFICE THESE PRIVILEGES AND COMPEL DISCOVERY.

In addition to the fact that the inquiries to the State are not reasonably calculated to lead to admissible evidence, they necessarily require the disclosure of information and communications for which the State properly claims a privilege.

The Federal Rules of Civil Procedure preserve the privileges of all parties and explicitly limit discovery to non-privileged matters. Fed. R. Civ. P. 26(b)(1). The Federal Rules of Evidence provide that:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with repsect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501. This rule instructs that the propriety of claiming privilege in any specific instance must be analyzed with reference to Minnesota law.

A. Inquiries Reilly Tar addressed to the State's attorneys and employees necessarily require disclosure of information protected by the attorney-client privilege.

1. THE STANDARDS FOR DETERMINING WHETHER THE ATTORNEY CLIENT PRIVILEGE HAS BEEN PROPERLY CLAIMED ARE WELL SETTLED IN MINNESOTA.

The existence and scope of the attorney client privilege is codified in Minnesota as follows:

> An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of his professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Minn. Stat. § 595.02(2) (1982). This codification constitutes a legislative enactment of the attorney client privilege as it existed at common law. Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 397 (Minn. 1979). Thus, case law construing the privilege at common law is relevant.

In an often-quoted passage on the attorney client privilege, the court in United States v. Shoe Machinery Corp., 89 F.Supp. 357, 358-359 (D. Mass. 1950), sets forth the conditions under which the attorney client privilege may be asserted:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. The Eighth Circuit adopted this definition of privilege in Diversified Industries, Inc., v. Meredith, 572 F.2d 596, 601-602 (8th Cir. 1977) together with the following shorter definition:

> where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

Diversified Industries, Inc., supra at 602. Where the privilege exists, it operates as an absolute bar against disclosure. Diversified Industries, supra at 602.

2. TESTIMONY WHICH REILLY TAR SEEKS TO ELICIT THROUGH ITS MOTION TO COMPEL REQUIRES DISCLOSURE OF COMMUNICATIONS PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE.

In its First Discovery Brief at 20, Reilly Tar sets out the elements needed to properly assert the attorney client privilege, then claims generically that

> Under the above-stated rules concerning the attorney-client privilege, the information which Reilly seeks from Messrs. Lindall, Van de North, Macomber, Worden and Popham is not protected by the attorney-client privilege.

First Discovery Brief at 21. In its Revised Discovery Brief, Reilly Tar makes no more specific assertion that the privileges are ill-claimed and never clearly indicates which elements of the privilege it thinks are missing.

On May 16, 1983, Reilly Tar hand delivered to the State the "Table of Deposition Questions Submitted in Support of Reilly Tar & Chemical Corporation's Renewed Motion for An Order Compelling Discovery" ("Reilly Tar's Table"). In the eleven months that its motions to compel discovery have been pending, this is the first time Reilly Tar actually stated its arguments in support of each inquiry it makes.

Reilly Tar's heading of the last column in its Table is "Reason the Answer is Not Privileged." Review of the arguments made in this Table show the heading to be a misnomer. For the

most part, Reilly Tar does not argue in its Table that the answers to the questions to the State are not privileged; instead, it argues that the privilege has been waived or should be sacrificed for good cause. In other words, Reilly Tar's generic claim that none of the answers are privileged is inconsistent with its own question-specific analyses. Even Reilly Tar admits information it seeks to elicit from the State is privileged under Minnesota standards.

Despite the acknowledgement provided in the Table as to the privileged nature of most of the answers to questions asked of the State, Reilly Tar continues to argue in generic terms that none of its inquiries reach privileged communications. Thus, in its various discovery briefs Reilly Tar argues: (1) that the communications it seeks to discover from the State were not "intended to be kept confidential" 17/; (2) that its questions inquire into "underlying facts" rather than privileged communications 18/; (3) that "when properly applied," the attorney client privilege only protects client-generated communications 19/; and (4) that the "common interest" privilege

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17/ Revised Discovery Brief at 33-36; Reilly Tar's First Discovery Brief at 22-24.

18/ Reilly Tar's First Discovery Brief at 20-21.

19/ Reilly Tar's First Discovery Brief at 20-21; Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for an Order Compelling Production of Documents, dated April 20, 1984, at 12.

for communications made between the City or its attorneys and the State or its attorneys was automatically destroyed when the City entered into a hold harmless agreement with Reilly Tar. 20/ Each of these arguments is rebutted below. 21/

As to the first argument, that the requisite intention of confidentiality is lacking, Reilly Tar merely states:

> It is not, for example, true that merely any statement made by a client to an attorney is privileged, as might seem apparent from a reading of Minn. Stat. § 595.02(2) or the arguments of the State and the City. Only those communications both made in confidence and whose subject matter is intended to be and to remain confidential are privileged.

Revised Discovery Brief at 33-34. Throughout its confidentiality argument, Reilly Tar states undisputed principles of law as if they were disputed. Again, speaking generically and claiming omniscience as to the State's private, unexpressed intentions, Reilly Tar states that:

> communications made by the City or the MPCA to Worden or Lindall staking out a position to be taken in negotiations over the Purchase Agreement or some other aspect of settlement are not privileged, inasmuch as there is no intention that the subject matter of such a communication remain confidential.

Reilly Tar's Revised Discovery Brief at 34-35. As to the State, this argument is doubly flawed. First, the argument fails to

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20/ Revised Discovery Brief at 35-36; Reilly Tar's First Discovery Brief at 21-22.

21/ Appendix 2, which is the State's response to Reilly Tar's Table, also provides a rebuttal to Reilly Tar's arguments on a question-by-question basis.

recognize that a client can communicate some information intended to be confidential, and other information intended to be public. Under Reilly Tar's unrealistic view of the nature of communications, a client's intention to disclose any information must be read as intention to disclose all. This view is factually unsound. Second, the statement is flawed because it seeks to prove its own truth by merely claiming that it is true. While Reilly Tar had ample opportunity to ask lay witnesses and attorneys whether they understood communications to them as intended to be confidential, it neglected to do so. Instead, it argues that communications between the City and the State were not intended to be kept confidential because they were not intended to be kept confidential. This self-serving statement does not destroy the State's claim of privilege.

In the present lawsuit, the State has continually informed Reilly Tar that it viewed its past communications with the City, except during a short period in 1973-74 as confidential. 22/ In a letter dated November 24, 1982, from Dennis Coyne to Edward J. Schwartzbauer, the State explained:

> We continue to assert that communication between counsel for co-plaintiffs is generally privileged communication. We also recognize that some communication between co-counsel may not be privileged. For example, a joint statement by counsel

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22/ The absence of a privilege claim as to State-City communications during the period following the Hold Harmless Agreement and the City's dismissal is discussed infra, at 47-49.

> could be made to a third party. Such a statement, intended for disclosure, would not be privileged.

See State's First Discovery Brief, Exhibit 2. 23/ In an effort to find a means of discovery which might eliminate objections which could be resolved by a change in the form of a question, Mr. Coyne made this recommendation:

> We make this recommendation to proceed with written questions, with the expectation that this procedure will get you the information you desire, with a minimum of delay and cost, while protecting our clients' privileged communications with its counsel, as well as protecting the work product of counsel.

Id.

Reilly Tar declined to accept the recommended procedure and made no offer of its own to resolve the dispute. Moreover, it made no attempt to explain why it believed the communications which the State and City jointly describe as being made in confidence should be classified as something other than confidential.

23/ The letter also went on to say:

> . . . we would have no objection to your inquiry as to statements which were made by Bob Lindall to Gary Macomber, with the expectation that Gary would convey the statement to Tom Reiersgord. Specifically, we would have no objection to a question as to whether Bob told Gary to make certain representations to Tom with regard to reinstatement of the lawsuit on the trial calendar. If the answer is in the affirmative, we would have no objection to a follow-up question as to what Bob told Gary to represent to Tom, as well as no objection if you inquire as to whom Bob met with prior to speaking to Gary.
>
> At this time, the State would object to these questions as not "reasonably calculated to lead to admissible evidence," given the dismissal of Reilly Tar's "implied settlement defense" and therefore outside the scope of permitted discovery.

The State repeatedly attempted to persuade Reilly Tar to narrow the focus of its questions so as to avoid inquiry into privileged areas. Reilly Tar continually ignored these attempts and elected, instead, to ask the same question over and over, receiving the same properly-asserted objection. 24/ On these

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24/ The following series of questions directed to the State's attorneys is illustrative of the over-reaching nature of Reilly Tar's questions to the State:

BY MR. SCHWARTZBAUER:

Q You will note that the various pages have stamped numbers at the bottom. May I just refer you to stamped Page No. 306136. Now, I appreciate the yellow highlighting which is supposed to be invisible on the Xerox copy is not invisible on the copy in front of you. I will read this language to you.

MR. COYNE: Which language is that, Ed?

MR. SCHWARTZBAUER: On Page 306316, the third paragraph.

MR. COYNE: The one that is obliterated in Mr. Lindall's?

MR. SCHWARTZBAUER: That is why I am reading it.

BY MR. SCHWARTZBAUER:

Q "In 1932 complaints were made to the Village of St. Louis Park that a municipal well contained water with a tarry taste. This well (No. 8A) was subsequently abandoned. At the same time a group of shallow private wells were also abandoned due to taste and odor problems."

Did that information relating to a municipal well coming up with a tarry taste come to your attention in the course of your duties?

continued on page 28 . . .

facts, Reilly Tar cannot now claim that its questions do not reach confidential communications.

As to its second argument, that its questions inquire into "underlying facts" rather than privileged communications, Reilly Tar again merely states a general principle of discovery, but does not apply that principle to the present case. In neither of its discovery briefs does Reilly Tar explain that the State and

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24/ . . . continued from page 27

> MR. COYNE: I object to the question since it elicits the testimony from Mr. Lindall as counsel for the Agency as to what his client communicated to him during the course of his employment.

BY MR. SCHWARTZBAUER:

Q Did it come to your attention in any form?

> MR. COYNE: I object again. Ed, I don't know if you are asking this witness if he learned about this well closing by reading the newspapers, as an example?
>
> MR. SCHWARTZBAUER: In any form was my question.
>
> MR. COYNE: You are saying outside of any employment with the Agency and his role as attorney for the Agency?
>
> MR. SCHWARTZBAUER: He can answer any -- he doesn't need all of your frequent interruptions.
>
> MR. COYNE: Thank you for speaking for the witness, Ed. It is my responsibility to assure that this deposition proceeds without any later arguments of waiver of certain privileges, and that is why I am taking care in terms of exploring the question and suggesting to you that there may be alternate ways to frame questions, if you will. But it's only in that regard that I have asked you if you mean to say outside of his employment as attorney for the Agency if he has ever learned about the allegations or references in the paragraph. Is that the question you are asking him, Ed?

continued on page 29 . . .

the City supplied it with a list of 20 or more persons it could depose to determine the "underlying facts" of the present

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24/ . . . continued from page 28

MR. SCHWARTZBAUER: I asked him the question I asked him.

BY MR. SCHWARTZBAUER:

Q Did you learn of that information in any form or from any source?

MR. COYNE: I object for the same reasons I objected earlier. The question is overly broad and it delves into his communications with the PCA staff and others.

BY MR. SCHWARTZBAUER:

Q Can you answer that yes or no, Mr. Lindall?

MR. COYNE: My objection and my direction to Mr. Lindall is not tot testify with regard to any communications and knowledge he learned while he was employed with the Agency in the course of his performance of his duties as a Special Assistant Attorney General. To the extent that there are communications outside of that capacity you may answer, although at this point I am not even clear when the area of inquiry is that you are asking him to be responsive of. Maybe he does.

MR. SCHWARTZBAUER: Let me clarify. Are you telling us that you are going to instruct him not to answer any questions designed to elicit information that came to his attention in any matter in the course of his duties other than as attorney for the PCA? Are you simply refusing him to answer any questions that came to him in the form of the privileged communications?

MR. COYNE: If Mr. Reiersgord --

MR. SCHWARTZBAUER: Let's not talk about Mr. Reiersgord. I just want to know your admonition to the witness. What is your instruction to him? I don't want to talk about Mr. Reiersgord. We will do that when we take his deposition.

continued on page 30 . . .

litigation, nor does it disclose that the State did in fact permit its attorneys to answer questions which did not involve the attorney client or some other privilege. Rather, Reilly Tar generically states that any questions it asked the State's

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24/ . . . continued from 29

MR. COYNE: The difficulty, Ed, in responding to your question is that you interrupted me. The direction to the witness is not to respond to questions which elicit from him the privileged communications or work product.

MR. SCHWARTZBAUER: Are you instructing him not to answer my last question?

MR. COYNE: What was your last question? Read it.

MR. SCHWARTZBAUER: My question to the witness is whether he learned of the information of a municipal well closure in any form or from any source. I want to know whether you are telling him not to answer that.

(Whereupon, a short recess was taken.)

BY MR. SCHWARTZBAUER:

Q With respect to the 1932 Complaint and subsequent abandonment of a well referenced on Page 306136 of Exhibit 3, Bob, my question to you is did you learn about that in any form or from any source?

MR. COYNE: I object and the basis is that the question in its present form inextricably intertwines attorney communications and work product and therefore, I am instructing the witness not to answer. In my view the burden is to the interrogator to frame questions precisely enough so that the witness may answer without compromising or entering the compromising privileged area.

MR. SCHWARTZBAUER: I don't choose to argue about it right now, but I will later.

Dep. of Lindall, 32:9 - 36:24.

attorneys were intended only to get at "underlying facts" rather than "privileged communications" and should therefore be permitted. Such a meager assertion is hardly sufficient to overcome the logical conclusion that a question such as "Did you learn in approximately December of 1980 [sic] at the Pollution Control Agency, that Reilly Tar as Republic Creosote activities had caused ground or ground waters pollution?" (Deposition of Robert J. Lindall at 67:17-67:20) constitutes nothing less than an inquiry into communications falling squarely within the attorney client privilege of the State.

Reilly Tar's third argument, that when "properly applied," the attorney-client privilege only protects client-generated confidences, was raised in its First Discovery Brief at 20-21 and its Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for an Order Compelling Production of Documents at 12, but is not reargued in its Revised Discovery Brief. The argument itself is directly contrary to the law of the State of Minnesota, which under Fed. R. Evid. 501, is controlling in this matter. See Minn. Stat. § 595.02(2) (1982) [quoted supra, at 20].

Reilly Tar cites no cases contrary to this statute, makes no effort to explain its unadorned claim that only client-generated confidences are protected, and, finally, fails to provide any basis for the Court to conclude other than that the communications at issue are privileged. The Court therefore must find that the communications in question, either from or to the State's

attorneys, are in fact privileged.

In its fourth argument, Reilly Tar correctly admits that the City and the State possessed a "legitimate expectation" that a common interest privilege applies to communications between them, 25/ but wrongly asserts that that legitimate expectation is automatically destroyed by the City's having simply entered into a hold harmless agreement with Reilly Tar. Reilly Tar's First Discovery Brief at 21-22 and Revised Discovery Brief at 35-36. In support of its claims that the State and the City have lost their privileges, Reilly Tar cites Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc. 90 F.R.D. 45 (N.D. Ill. 1981). In that case, a former joint defendant, who was a party to a settlement with other defendants in an earlier law suit, sued his co-defendants. After acknowledging that the work product privilege did apply, the Ohio-Sealy court addressed the question as to whether "the work product privilege is dissipated when the former joint defendants square off against one another in subsequent litigation." Emphasis supplied. Id. at 48. In responding to this question, the Court concludes that ordinary work product, but not core work product may be obtained over a claim of

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25/ This common interest aspect of the attorney-client privilege is discussed in Annot. 53 A.L.R.3d 1420, § 3. The annotation includes discussion of a Minnesota decision upholding this aspect of the privilege, Schmitt v. Emery, 211 Minn. 539, 2 N.W.2d 413 (1942) (Cited in Annot., supra, at 1425).

privilege. [See discussion infra at 34-36 for further explanation of the difference between "ordinary" and "core" (or "opinion") work product."]

The decision in the Ohio-Sealy case plainly turned on its facts. The Court in that case remarked that it was different from other cases which "do not involve the situation presented here, where the party seeking disclosure in the subsequent, related litigation was a joint defendant in the litigation in which the work product was generated." Id. at 48, n. 7. Indeed, the Court in a related case, Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980), states the following rule regarding the use of privileges when several parties are involved:

> Where two or more persons jointly consult an attorney concerning a mutual concern, 'their confidential communications with the attorney, although known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world. (Citations omitted.) Moreover, the joint defense privilege cannot be waived without the consent of all parties to the defense, except in the situation where one of the joint defendants becomes an adverse party in a litigation. (Citation omitted.)

With respect to information which constitutes privileged communications between the City and State attorneys, the Ohio-Sealy case is inapplicable. Unlike Ohio-Sealy, there is not an "adverse" party attempting to obtain disclosure of privileged information from a party with whom it was formerly united in a joint position; rather, it is Reilly Tar who is attempting to

obtain privileged information from two parties who are adverse to it. Although Reilly Tar attempts to portray the State and the City as adverse, the fact is that an analogy to the "adverse party" situation described in both Ohio-Sealy cases, supra, would exist only if the City or the State were attempting to pierce the privilege asserted by the other. Since such is plainly not the case, Reilly Tar's attempt to undo the privilege afforded the communications between the attorneys for the State and City is without support. 26/

B. Inquiries to which the State objected necessarily require disclosure of information protected by the work product privilege.

1. THE STANDARDS FOR DETERMINING WHETHER THE WORK PRODUCT PRIVILEGE HAS BEEN PROPERLY CLAIMED ARE WELL SETTLED IN MINNESOTA.

In its Revised Discovery Brief, Reilly Tar admits that its "inquiries will necessarily probe the mental impressions held by lawyers in 1970-73." Revised Discovery Brief at 37. These inquiries, Reilly Tar asserts, do not "violate the principles which protect lawyers 'work product'" because "a lawyer's mental impressions, conclusions, etc." are not in themselves 'work product.'" Id. In sum, Reilly Tar contends that "work product" protection is afforded only to tangible things.

26/ See also arguments, infra, at 47-49, acknowledging that no privilege is claimed for communication between the City and the State from the time of the Hold Harmless Agreement in June, 1973, until the report of the finding of carcinogenic substances at the Reilly Tar site in October, 1974.

Reilly Tar's argument is incorrect. The work product doctrine protects from disclosure both tangible and non-tangible responses to questions invading the province of trial preparation. Tangible things, such as documents, are protected as work product under both state and federal rules of civil procedure, Fed. R. Civ. P. 26.02(3) and Minn. R. Civ. P. 26(b)(3). 27/ Non-tangible responses, such as oral answers to questions propounded at depositions, are protected as work product under the common law as enunciated in Hickman v. Taylor, 329 U.S. 495 (1947) and later cases. 4 Moore's Federal Practice (2d ed.) ¶26.64[4], 26-451 - 26-452. The Supreme Court in Hickman at supra 329 U.S. at 511-12 explained the work product rule as follows:

> Historically a lawyer is an officer of the court and is bound to work for the advance of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to protect their client's interest. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.'

[Emphasis supplied.]

27/ The federal and state rule limiting discovery on tangible things constituting work product are identical.

Thus, it is plain that responses to questions asked of attorneys constitute work product if they reach into information related to the preparation of the case for trial.

The protection afforded by the work product doctrine is perpetual; it extends to documents prepared even in previous, unrelated litigation. Federal Trade Commission v. Grolier, 103 S.Ct. 2209 (June 3, 1983). "Ordinary" work product (i.e., that not containing mental impressions or conclusions of a lawyer) is afforded a qualified immunity, it can be discovered only upon a showing of substantial need. "Opinion" or "core" work product (i.e., the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation) is afforded a "nearly" absolute immunity and is basically shielded from all discovery. In Re Murphy, 560 F.2d. 326, 334-336 (Eighth Cir. 1977).

In its Revised Discovery Brief at 37, Reilly Tar admits that its questions seek to inquire into the "mental impressions" of lawyers of the State and the City in 1970-1973. These inquiries fall squarely within the definition of opinion work product. In Re Murphy, supra at 336; 4 Moore's Federal Practice, supra, at 26-452 - 26-453. As with its attorney client arguments, Reilly Tar states generically that "the elements necessary for assertion of the work product doctrine are not present here" (First Discovery Brief at 25); but never provides an analysis in support of this conclusion. Reilly Tar's general argument is insufficient to

overcome its own admission that what it seeks to probe are the "mental impressions" of lawyers of the State and the City. Thus, Reilly Tar is only entitled to make its inquiries if it meets the "substantial need" standard for ordinary work product and the "nearly absolute immunity" standard for opinion work product, tests it is unable to meet.

2. REILLY TAR CANNOT MAKE THE SHOWINGS NECESSARY TO OVERCOME THE IMMUNITY OF WORK PRODUCT TO DISCOVERY.

In its own explanation of the basis for its inquiries to the attorneys of the State, Reilly Tar explains: "In this case . . . Reilly's main purpose in questioning the lawyers who negotiated the settlement and drafted the documents is to ascertain the scope of its intended settlement." Revised Discovery Brief at 37. In expanding on this purpose, Reilly Tar further states:

> In this case, Reilly is not trying to obtain the trial strategies, legal opinions or theories of its adversaries. Rather, it is trying to ascertain the details of the settlement of a lawsuit in 1972 and 1973, and the meaning of certain agreements entered into in those years. The parties who negotiated the disposition of the case and the agreements happen to be lawyers. We want their intent, an intent that might have been held by a non-lawyer, had the negotiator been a lawyer [sic].

Revised Discovery Brief at 38.

Thus, Reilly Tar's sole basis for invading the work product of the State is Reilly Tar's contention that it wishes to determine the State's "intent" to a settlement to which it was not a party.

Reilly Tar's claim that it needs to inquire of State attorneys as "negotiators of the litigation settlement" is based on two assertions having no support in the lengthy record of this action. First, Reilly Tar asserts that there was an implicit settlement between the State and Reilly Tar. Second, it apparently claims that the State's lawyers negotiated the explicit settlement between Reilly Tar and the City. Neither of these claims are true. Thus, Reilly Tar's contention that it needs to inquire into the mental impressions of the State should be rejected at the outset.

In support of its argument that attorney's work product should be discoverable in this case, Reilly Tar cites American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978). That case involved a question of fraud and an effort to obtain information from an attorney as to when the fraudulent misrepresentations were first discovered. (The answer to this question would determine the outcome of the statute of limitations defense raised in the case.) In considering the case, the court refers to the Eighth Circuit's holdings In Re Murphy and states the following:

> In this case one of the "rare situations" anticipated by the Eighth Circuit Court of Appeals is apparent. Plaintiff contends that the defendant committed fraud upon Wilcox by making misrepresentations to Wilcox concerning the 'design status and productibility' of the APX-72. To avoid the bar of the applicable statute of limitations, plaintiff formally contends that it did not discover the fraud until 1973 when it was discovered by its attorney Mr. Moore and his associate. Mr. Moore then becomes one of the most important

> trial witnesses in the case, subject to direct and cross-examination on the details of what information he had prior to 1973 and in 1973, and concerning the nature and timing of his conclusion (mental impression) that fraud had occurred and in what particulars it had occurred. Since fraud is a legal concept involving a mixed question of law and fact, the discovery cannot be limited to purely factual information. By contending that fraud occurred before 1973, and was not discovered until 1973 by its counsel, plaintiff has made it appropriate that the deposition of Mr. Moore (plaintiff's counsel) be taken by the defendant.

American Standard, supra, at 709. Emphasis supplied.

In arguing for an exception to the immunity afforded by work product privilege, Reilly Tar analogizes to the American Standard case, but neglects to point out essential differences between that case and the matter before this Court. Thus, in American Standard, (1) the party who asserted the privilege was the same party who raised the issue relevant to the privileged testimony and (2) the party seeking to discover the privileged information plainly met its burden of demonstrating substantial need to determine the date the fraud was discovered, through questions of the person alleged to have made the discovery.

The case before this Court involves a defendant raising an unsupported allegation of implied settlement, an issue no longer material to this case. Contrary to the facts of the American Standard case, the party asserting the privilege is not the party who raised the issue which makes the privileged information relevant. 28/ Also contrary to American Standard, the party

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28/ See arguments as to who put the scope of the settlement between Reilly Tar and the City at issue, infra, at 45-47.

seeking to pierce the privilege should have been able to offer substantial proof on its case (that there was an implied settlement) without the privileged testimony.

Reilly Tar's claim that it needs to depose the "negotiators" to its settlement with the City does not reach the State. Questions regarding those negotiations are properly directed to the persons who negotiated the agreements between the City and Reilly Tar. This includes, first, lay witnesses for the City and Reilly Tar, and if Reilly Tar can demonstrate the bases to set aside the City's privilege claims, then the City's counsel. 29/ Only when it has completed its inquiries to lay witnesses and any inquiries which the Court may permit to the City counsel, might Reilly Tar be in a position to assert such exceptional circumstances as would justify sacrifice of the State's work product privilege. Under the circumstances demonstrated by the present record, this Court must deny Reilly Tar's request for an order compelling disclosure of the State's work product.

29/ In Winter v. Koratron Company, 50 F.R.D. 225, 227 (N.D. Cal. 1970), the court concluded that, where information is known to both lawyers and laypersons, the lay witnesses should be examined first to avoid the "awkward and undignified procedure of requiring a lawyer to first reveal matters communicated to him by clients." This conclusion was reached even though much of the communication at issue was not protected by a privilege. In a case such as the present one, where a privilege does attach, an even stronger reason to require examination of lay witnesses before permitting examination of counsel exists.

III. REILLY TAR'S CLAIM OF WAVIER OF THE STATE'S PRIVILEGES THROUGH VOLUNTARY DISCLOSURE, AFFIRMATIVE USE, PLACING MATTERS AT ISSUE, OR ADVERSITY TO THE CITY ARE ALL WITHOUT FACTUAL BASES.

A. No Waiver Should Be Found Through Inadvertent Disclosure Of Privileged Documents Where The Party Asserting The Privilege Had No Intention To Waive Privilege and Made Good Faith Efforts Toward Protecting Privileged Documents. If The Court Finds There Has Been No Waiver As To Those Documents There Would Be No Basis for Finding A Waiver As To All Communications Relating To The Same Subject Matter.

In support of its Motion for Return of Privileged Documents Inadvertently Produced, 30/ the State has recently submitted a memorandum reviewing the two lines of federal decisions on waiver of privilege by inadvertent protection and urging this Court to follow the decisions which held no waiver had occurred where the holder of the privilege had no intent to waive and made good faith efforts toward that end. The Court was urged to follow decisions such as Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982); Overhead Door Corp. v. Nordpal Corp., No. 4-75-Civ. 523 (D. Minn. August 24, 1978); and Control Data Corp. v. IBM, 16 F. R. Serv. 2d 1233 (D. Minn. 1972). For the full discussion of this issue the Court is referred to the Statement of Points and Authorities In Support of the State of Minnesota's Motion for Return of Privileged Documents Inadvertently Produced, at 6-13, and the accompanying Shakman Affidavit, both dated April 26, 1984.

30/ This motion was scheduled for hearing on May 10, 1984, and has been rescheduled to May 30, 1984, at the request of Reilly Tar's counsel.

In its Renewed Motion to Compel Discovery and its Motion to Compel Production of Documents (April 20, 1984) 31/, Reilly Tar argues that the State's production of privileged documents constitutes a waiver of privilege not only as to those documents but also as to all other documents and communications relating to the same or similar subject matter. Reilly Tar also argues for a finding of waiver because certain of the documents it seeks were identified in summary chronologies prepared by the City on October 30, 1974, and by the staff of the MPCA on October 29, 1974, for which no privilege is claimed. (Copies of these chronologies are being submitted by the City's counsel.) The State contends that its summary chronology does not constitute a disclosure because it does not reveal the substance of privileged communications. More generally, the State contends that if the Court finds in its favor on the absence of waiver as to the privileged documents inadvertently produced, Reilly Tar's claim of waiver through partial discovery must necessarily also be

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31/ Appendices 3 and 4 to this memorandum are copies of Reilly Tar's October 6, 1983, Request for Production of Documents and the State's November 15, 1983, Response to Reilly Tar's Request for Production of Documents which form the basis for the present motion to compel production of documents. Item 2 in the November 15 response needs further explanation. It refers to a request for correspondence between Special Assistant Attorney General Robert J. Lindall and MPCA Director Grant Merritt which Reilly Tar had earlier requested. The State's response refers Reilly Tar back to the earlier response in which the State asserted attorney-client privilege as to that document. The State is prepared to submit the documents withheld to the Court for its in camera inspection.

rejected. However, as will be demonstrated below, even if the Court does not find in the State's favor on the inadvertently produced documents, there still is no reasonable basis for extending the waiver beyond the four corners of those documents.

B. The State Has Not Selectively Produced Certain Privileged Documents Or Otherwise Used Privileged Information Affirmatively To Gain A Tactical Advantage. Even If Privileged Documents In Reilly Tar's Possession Are Not Ordered Returned, The Grounds For Finding A Broader Waiver Are Totally Lacking.

Reilly Tar correctly cites the decisions prohibiting the holder of a privilege from selectively disclosing certain privileged information to gain a tactical advantage and then barring opposing parties from access to other privileged documents relating to the same subject. See, e.g., United States v. Jones, 696 F.2d 1069 (4th Cir. 1982); In Re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982). Reilly Tar, however, is completely in error in trying to fit the circumstances of the present case into this principle. There has been no use, affirmative or otherwise, by the State of any privileged information.

First, the privileged documents which the State acknowledges it and the City 32/ inadvertently produced in the summer of 1979 have not been used in depositions, affidavits, motions, or any other fashion by the State. The State has consistently objected

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32/ The two City documents involved reflect discussions between the City and State in the fall of 1977 about reviving litigation against Reilly Tar.

to their use by Reilly Tar and sought their return from Reilly Tar. There has been no effort to gain any advantage from this accidental disclosure. 33/

Second, the submission of the affidavits of former State counsel John B. Van de North, Jr., and Robert J. Lindall in support of the State's motion for summary judgment were not, as Reilly Tar alleges 34/, an affirmative use of privileged information. The main point of both the Lindall and the Van de North afidavits was that neither had entered into a settlement agreement of the 1970 lawsuit with Reilly Tar. As Judge Magnuson has carefully explained in the Court's Memorandum Order of August 25, 1983, at 13-15, contracts of settlement can be created only by express manifestation of mutual assent. If one of these State attorneys had exchanged mutual assent to settlement terms with Reilly Tar, there would obviously be no privilege as to that exchange vis-a-vis Reilly Tar (or the rest of the world). Similarly, the actual affidavits which state that there had been no such exchange disclose no privilege. There was nothing confidential about the fact that the State had never settled with Reilly Tar.

33/ Also see the argument, infra, at 44-45 responding to Reilly Tar's claim that it was the State which placed the scope of the 1970 litigation at issue.

34/ Reilly Tar Revised Discovery Brief at 55-57.

The ultimate illogic of Reilly Tar's attempt to fashion a waiver argument out of the State attorneys' affidavits is its characterization of them as "a conscious decision thrice made on the part of the State to utilize its former lawyers to testify as to facts such as settlement vel non in a conclusory fashion, rather than have someone else do it." Reilly Tar Revised Discovery Brief at 56 (emphasis added). As Judge Magnuson noted, the Attorney General had the authority to settle such a lawsuit but would do so only after overt approval by the MPCA Board. Memorandum Order, slip op. at 9. Consistent with the requirement of Rule 56(e), Fed. R. Civ. P., that affidavits be made on personal knowledge, these case attorneys (together with the chief counsel for the MPCA) were the proper individuals to testify as to the absence of any exchange with Reilly Tar that might constitute a settlement agreement. It is clear that their affidavits, along with the certified minutes of the MPCA Board, were the only way to demonstrate the absence of a settlement. There was no way, as Reilly Tar suggests, "[to] have someone else do it."

C. The State Has Not Affirmatively Placed In Issue The Scope Of The 1970 Lawsuit And No Waiver Can Be Found On That Basis.

In the same view, a brief rebuttal is due Reilly Tar's repeated assertion that the State has waived its privileges by affirmatively placing in issue the scope of the 1970 lawsuit.

A matter cannot logically be considered to have been "affirmatively placed in issue" in a lawsuit until resolution of that matter becomes material to some issue in the lawsuit itself. Thus, not until testimony on a matter is relevant to the litigation is it reasonable to consider a matter to have been "affirmatively placed in issue."

Using this analsyis, it becomes plain that it is Reilly Tar and not the State which affirmatively placed at issue the questions of the scope of the 1970 lawsuit or the meaning of the Purchase and Hold Harmless Agreements between Reilly Tar and the City. The complaints and amended complaint of the State raises no issues related to these matters and resolution of those questions would have no bearing on the claims made and relief sought. The issues, however, were raised by Reilly Tar in its answer to the several complaints.

Not only did the State not place these matters at issue, it successfully brought a motion for summary judgment to have them dismissed as raised against it. The thrust of that motion was that there was no need to reach the scope of the alleged settlement agreement between Reilly Tar and the State because the record was void of all the essentials for formation of such an agreement. The State's has never affirmatively raised the issues of the scope of the 1970 lawsuit or the meaning of the Reilly Tar-City agreements.

D. The City's Execution of a Hold Harmless Agreement With Reilly Tar and Dismissal of its Lawsuit Against Reilly Tar in 1973 Does Not Destroy All Claims of Privilege Between the City and the State. It is Conceded That No Privilege Existed For Communications Between the Execution of the Hold Harmless Agreement and the Finding of Carcinogenic Materials at the Former Reilly Tar Site in October, 1974.

The maintenance of privilege for attorney-client and work product information shared between parties with a common interest has long been recognized by the courts. Schmitt v. Emery, 211 Minn. 539, 2 N.W.2d 413, 417 (1942); Annot., 9 A.L.R.3d 1420. It has been held that pending litigation is not an essential condition for finding a common interest.

> But 'common interests' should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.

U.S. v. A.T.&T., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

The State contends that this common interest protection should be accorded confidential communication between the State and the City during the planning for the 1970 lawsuit, the pendency of that suit as a joint action by the City and the State (i.e., until the Hold Harmless Agreement of June, 1973), and the pursuit of the party responsibility for the present contamination of St. Louis Park ground water by carcinogenic and other PAH chemicals.

The State and City maintain that the common pursuit began with the Minnesota Department of Health's report of finding carcinogenic compounds at the former Reilly Tar site in October, 1974. Through studies initiated by the State and the City, it was confirmed by 1978 that small amounts of these carcinogenic chemicals had contaminated much of the City's drinking water supply in underground aquifers.

Reilly Tar acknowledges that a common interest privilege may have existed until the time of the Hold Harmless Agreement but that the Agreement rendered the State and City adverse, thereby destroying all claims to such privilege. Revised Discovery Brief at 19, 36. In support of its contention, Reilly Tar points to disputes between the State and City in the mid-1970's over development of the former Reilly Tar site and issuance of a permit for surface water drainage to the Minnehaha Creek.

The State and City concede that no privilege exists for communications between the Hold Harmless Agreement in June, 1973, and the report of carcinogenic contamination in October, 1974. For communications in the period of the joint lawsuit (early 1970 to June, 1973), the privilege should be honored because the City and State were in common interest in seeking abatement of pollution from an operating industry and (particularly after the 1972 termination of operation) clean up of the residual surface contamination. Although the Hold Harmless Agreement resulted in City responsibility for the residual surface contamination, the

City and State have not come into adverse proceedings vis-a-vis one another and sought to utilize that earlier privileged communication against one another. As discussed infra at 32-34, the privilege is not lost unless there is such direct confrontation and one of the parties seeks to utilize the privileged communication itself.

The common interest again arose as to a new problem in October, 1974, with the report of carcinogens and expression of concern that they could reach the water supply for St. Louis Park and neighboring communities. This problem led to the State's 1978 amendment of the dormant 1970 lawsuit against Reilly Tar, the City's intervention therein, the federal government's commencement of the present action in 1980, and the intervention therein by the City of Hopkins in 1981. The United States, the State, and the two cities now share a common interest as co-parties and can exchange attorney-client and work product communications without fear of waiver.

In sum, Reilly Tar has no right to any confidential communications about common interests exchanged by the City and State from 1970 to date, apart from the 1973-74 period earlier described.

CONCLUSION

For the reasons given in this memorandum and in the accompanying question-specific analysis of Appendix 2, Reilly Tar's motions to compel testimony and to compel production of

documents should be denied in all respects and the State awarded its reasonable costs of defending the motions.

Respectfully submitted,

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